

2000

Ralph R. Moffat; Village Park Apartments LLC;
and Willow Brook Apartments, LLC v. State of
Utah, Department of Workforce Services, and the
Workforce Appeals Board: Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Ralph R. Moffat; Village Park Apartments LLC; and Willow Brook Apartments, LLC	:	
	:	REPLY BRIEF OF
Petitioners,	:	PETITIONERS
	:	
v.	:	Case No. 20001080-CA
	:	
State of Utah, Department of Workforce Services, and the Workforce Appeals Board,	:	Priority No. 7
	:	
Respondents.	:	

PETITION FOR REVIEW OF DECISION OF WORKFORCE APPEALS BOARD
UTAH DEPARTMENT OF WORKFORCE SERVICES

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STATEMENT OF FACTS

Petitioners respectfully refer the Court to the detailed Statement of Facts set forth in Petitioners' opening brief. *See* Brief of Petitioners at 5-11.

ARGUMENT

The primary issue in this case is whether the July 31, 2000, decision of the Department of Workforce Services (the "Department"), which found Gaylen Harris ("Harris") is Petitioners' employee for purposes of the Utah Employment Security Act (the "Act"), is "supported by substantial evidence when viewed in light of the whole record before the court." *Tasters Ltd. v. Department of Employment Sec.*, 863 P.2d 12, 18 (Utah Ct. App. 1993), *cert den.* 878 P.2d 1154 (Utah 1994). As set forth in Petitioners' opening brief, and as addressed in Respondents' opposition brief, whether an individual is excluded from coverage under the Act depends on whether the individual is (A) engaged in an independent trade and (B) free from control and direction of the employer. *See* Utah Code Ann. § 35A-4-204(3)(a) & (b).

A. Engagement in Independent Trade

The Department's July 31, 2000, decision found Harris was Petitioners' employee because he was not engaged in an independent trade. R. at 51-55. Whether one is engaged in an independent trade is determined under seven factors set forth at Utah Administrative Code R994-204-303(2)(b). As necessitated by Respondents' brief, each factor is addressed in turn.

The first factor, separate place of business, was established by Harris' testimony that he considered his home as a place of business. R. at 50(38:21-41). Indeed, Respondents found Harris had a home office, *see e.g.* R. at 52, 190-91. The Respondents' brief even concedes Harris' "home might be considered an independent place of business." Brief of Respondents at 9.

The second factor is whether the individual "*has* a substantial investment in the tools equipment, or facilities customarily required to perform the services." Utah Admin. Code R994-204-303(2)(b)(ii) (emphasis added). Respondents inaccurately attempt to shift the focus to "whether or not the individual *supplied* the tools and equipment" for his services. Brief of Respondents at 9 (emphasis added). This is not the consideration set forth in the rules, regardless of how "insignificant" Respondents deem the materials required by one in Harris' profession. The irrefutable testimony before the Department was Harris owned all the equipment necessary to perform his services. R. at 15; 50(38:21-23); and 50(38:37 to 39:20).

Third, whether the individual had other clients, was also established by Harris' testimony. Nonetheless, Respondents speculate "it was more likely [Harris did not seek additional clients] because he was required to work for Petitioner 40 hours per work." Brief of Respondents at 9. Regardless of Respondents' interjection of motive completely unsupported by any record evidence, *see id.*, Harris' absolutely un rebutted testimony was it is not unusual for a freelance accountant to work for one client. R. at 50(49:21-24).

The fourth consideration is ability of the individual to suffer a profit or loss. Contrary to Respondents' characterization of Petitioners' argument, it was asserted this factor was of little relevance, not meaningless. It is true, as Respondents suggest, some professionals such as attorneys are able to realize a profit by performing flat-fee type work. *See* Brief of Respondents at 10. However, while conceding many bookkeepers are salaried, Respondents focus too much on examples not applicable under our facts. Certainly, Respondents do not suggest any professional paid on an hourly basis is necessarily an employee. Petitioners' argument on this point is simply, under the facts of this case, the profit or loss measure is not a clear indicator of an employment relationship based on the other factors.

Fifth, is whether Harris advertised his services. Again, Harris specifically testified his primary means of promoting his freelance services was by word-of-mouth advertising. R. at 50(40:44-45, 45:3-16). Incredibly, Respondents contend Petitioners' recitation of the evidence from the record is "inconsistent with the facts," Brief of Respondents at 11, and then just five sentences later speculate once again as to Harris' motive, thus creating Respondents' own "version" of the "facts." It is true, the Court must remember this is not a case where Harris has sought unemployment benefits only to learn Petitioners neglected to pay per the Act. Rather, this is an on-going relationship in which, even Respondents' own field investigator clearly documented Harris is free to "do other work if he chooses." R. at 14. Harris utilized methods of advertising he thought adequate. The effectiveness, or lack

thereof, of Harris' marketing abilities certainly cannot be determinative of an employment relationship.

The sixth factor under engagement in independent trade is whether the individual had a license. There is but one resolution of this issue: Harris had no license because no license is required to perform bookkeeping services. R at 50(35:25-27); 52.

The seventh and final factor is whether "the individual files self-employment and other business tax forms" Utah Admin. Code R994-204-303(2)(b)(vii). Again, this factor is overwhelmingly in favor of Harris' status as engaged in an independent profession because it is undisputed Harris routinely filed Schedule SE forms reporting self-employment income.

Thus, under the seven factors identified for considering engagement in an independent trade, the substantial weight of the record evidence weighs against Respondents' determination that Harris is Petitioners' employee. Accordingly, the Department's July 31, 2000 decision that Harris is Petitioners' employee should be reversed.

B. Control or Direction

The second prong of Utah Code Ann. § 35A-4-204(3)(b) focuses on whether the individual is "free from control or direction over the means of performance." Respondents contend the first three of eight factors, namely (1) instructions, (2) training, and (3) pace or sequence, "are not applicable to a case involving people who are hired to perform support services." Brief of Respondents at 14. Perhaps this is because these factors undeniably

indicate Harris is not Petitioners' employee. Specifically, Petitioners provided Harris no instruction regarding the performance of his services, *see* R. at 13, 15 & 50(58:12-15), provided no training to Harris, R. at 13, 15, and there was no evidence Petitioners influenced the pace or sequence of Harris' work. Thus, all three factors weigh decidedly against the Department's July 31, 2000, decision.

The fourth control or direction factor is whether services are required on the employer's premises. Harris did testify Moffat "required" him to be at work from nine in the morning until six at night. However, in providing freelance services, this is entirely consistent with Harris' pattern and practice. Specifically, Harris prefers to perform services on site because doing so avoids the need to shuttle numerous client files to and from his home office. R at 50(46:37-39). Further, Moffat indicated Harris was "free to come and go . . . if he chooses." R. at 14.

The fifth control or direction factor is whether the employer requires services be performed personally. Harris indecisively testified it was his "understanding" he was to perform services personally, but he never pushed the issue because he has no employees he could send in his place. R. at 50(54:1-18); R. at 13 (responding to personal service query: "I think so though never was discussed."). The definitive record evidence comes from Moffat's negative answer to the Department investigator's question whether he required Harris personally perform his services. R. at 15.

The sixth control or direction factor considers the duration of the relationship between the parties. Harris has performed services for Petitioners since 1996. During this time period Harris performed similar services for others, albeit infrequently. R. at 12; 34; 50(17:16-38; 38:25-35; and 39:22-45).

The seventh measure of control or direction is whether the individual had set work hours. As set forth in detail in the Brief of Petitioners, numerous factors weigh against an employment relationship in this regard, not the least of which is Moffat's indication Harris could come and go as he pleased. R. at 14 & 15.

The eighth control or direction factor considers method of payment. Petitioners paid Harris twice a month. This payment "schedule" alone is not sufficient to overcome the overwhelming weight of the evidence under the seven other factors demonstrating Harris was not subject to Petitioners' control or direction.

Finally, Respondents string cite a host of cases noting "[e]mployer-employee relationships were found" therein. See Brief of Respondents at 20. No explanation is given of the facts of these cases, the reasoning relied on in deciding the cases, nor how they differ in substance from the instant matter. See *e.g. Bigfoot's, Inc. v. Industrial Comm'n*, 710 P.2d 180, 181 (Utah 1985) (deciding case under now-inapplicable Utah Code Ann. § 35-4-22(j)(5)(B), which considered whether "the service is either outside the usual course of the business for which the service is performed or that the service is performed outside all the places of business of the enterprise for which the service is performed"); *Superior*

Cablevision Installers, Inc. v. Industrial Comm'n, 688 P.2d 444, 446-47 (Utah 1984) (deciding case under former Utah Code Ann. § 35-4-22(j)(5)(A) – (C)). As stated in *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998):

Implicitly, rule 24(a)(9) [of the Utah Rules of Appellate Procedure] requires not just bald citation to authority but development of that authority and reasoned analysis based on that authority. We have previously stated that this court is not a depository in which the appealing party may dump the burden of argument and research.”

Id. at 305 (internal quotations and citations omitted). Because Respondents fail to either develop the string of citations set forth in their brief or provide any reasoned analysis thereof, this Court should not look to the string-cited authority for resolution of the pending matter.

CONCLUSION

Under the Utah Administrative Code factors, for purposes of Utah Code Ann. § 35A-4-204(3), the substantial weight of the evidence supports a conclusion Harris is engaged in an independently established trade, occupation, profession, or business of the same nature as involved in the contract of hire for services. Further, under the Administrative Code factors, the substantial weight of the record evidence supports the conclusion Harris was free from Petitioners’ control or direction over the means of performance of his services. Because the substantial weight of the record evidence does not support the Respondents’ factual findings, the Respondents’ conclusion that Harris is Petitioners’ employee is an arbitrary and erroneous application of the law to the facts in this case. Accordingly, Petitioners

respectfully request this Court reverse the Department's determination that Harris is an employee and subject to the terms of the Act.

DATED this 1st day of August 2001.

WINDER & HASLAM

By: 

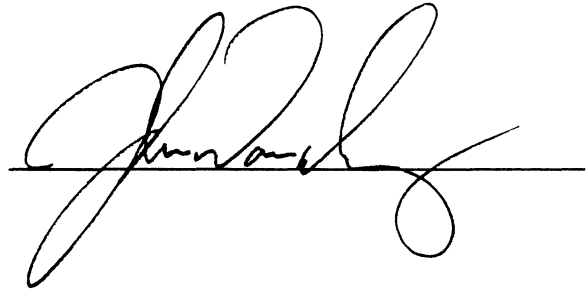
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CERTIFICATE OF SERVICE

It is hereby certified that on this 1st day of August, 2001, I caused to be served a true copy of the foregoing Reply Brief of Petitioners, by the method indicated below, to the following:

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